IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-898

PETER POMPONIO, PAUL POMPONIO,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners Peter and Paul Pomponio respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit has not yet been officially reported, but is annexed to this Petition as Appendix A. Previous opinions in this case are reported in *United States v. Pomponio*, 528 F.2d 247 (4th Cir. 1976) reversed in *United States v. Pomponio*, 45 U.S.L.W. 3273 (Oct. 12, 1976) (See Appendix B and C respectively).

## JURISDICTION

The Court of Appeals entered judgment on October 6, 1977 (Appendix A) and denied a Petition for Rehearing on November 22, 1977. The mandate was stayed on December 8, 1977 pending application for a Petition for Certiorari by December 22, 1977. This petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. In weighing the sufficiency of the evidence in a tax fraud case, whether the Court of Appeals misconstrued this Court's earlier opinion in the case and applied an improper, civil standard for evaluating criminal intent in a tax case, thereby frustrating the policies underlying this Court's decision in *United States v. Bishop* and *Spies v. United States*, and seriously confusing the administration and enforcement of federal civil and criminal tax legislation.

2. Whether the Court of Appeals conflicts with and ignores the standard imposed by three other circuits for determining the occasions requiring limiting instructions to the jury to counter the prejudicial impact of repeated and inflammatory prosecutorial references in its opening statement to alleged acts by the defendants relevant only to conspiracy charges which are subsequently severed from the trial.



3. Whether the Court of Appeals properly held, contrary to the practice of other circuits and its own prior law, that no voir dire was required to determine the jury's exposure either to massive pretrial publicity which was acknowledged both by the government and the trial court, or to prejudicial trial publicity, which the trial court recognized would require a mistrial if read by the jury.

## STATUTE INVOLVED

26 U.S.C. §7206(1) of the Internal Revenue Code provides:

> "Any person who "(1) . . . willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . .
>
> shall be guilty of a felony."

## THE PROCEEDINGS BELOW

Petitioners were convicted of willful evasion of federal income taxes under §7206(1) of the Internal Revenue Code. Each petitioner was fined $5,000 per count for a total of $15,000, and was sentenced to three years on each count, the sentences on each to run concurrently.[1]

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[1] The judge originally pronounced a sentence of a $10,000 fine on each count but when he was informed that this was in excess of the statutory maximum, he corrected the fines to $5,000 each (Record at 103).

On appeal their convictions were reversed by the United States Court of Appeals for the Fourth Circuit on the grounds that the trial court had not adequately instructed the jury on the issue of willfullness. *United States v. Pomponio*, 528 F.2d 247 (4th Cir. 1976). Upon the Petition for a Writ of Certiorari by the United States, this Court granted Certiorari and reversed the Fourth Circuit on the grounds that the jury had been adequately instructed. *United States v. Pomponio*, 45 U.S.L.W. 3273 (October 12, 1976). This Court then remanded to the Court of Appeals for the Fourth Circuit for consideration of the points raised in petitioners' appeal and not considered in its initial opinion. On October 6, 1977, the Court of Appeals rejected petitioners' remaining contentions on appeal and affirmed their convictions. Initially the Court of Appeals denied both the petition for a rehearing and petitioners' motion for a stay of the mandate; however, on December 8, 1977 a stay of the mandate was granted pending this application for a Writ of Certiorari.

## STATEMENT OF THE CASE

Petitioners Peter and Paul Pomponio were officers and shareholders in a number of family-owned close corporations and partnerships. They were charged with criminal tax fraud for two elements of accounting in connection with these businesses for 1969, 1970 and 1971. The first concerned loans received by petitioners from their corporations which were claimed by the government to be taxable income advances, despite petitioners' stated intention to repay the advances in the future and despite the loans being properly recorded on the corporate books, and even though their accountant, who prepared the tax returns without specific instructions, treated the loans as non-taxable.



The second concerned government charges that petitioners intentionally claimed certain partnership losses on their individual income tax returns for 1971, when, in the government's view, the losses should have been attributed to their corporation. The corporation, however, was acting as agent for the partnership under a written nominee agreement.

Similar charges against Louis J. Pomponio Jr., were severed prior to trial due to his sudden illness. After a full trial, based upon the same facts, a jury acquitted him on all counts.

### Corporation Funds Received By Petitioners

In accordance with their longstanding practice, from time to time petitioners received loans of money from their corporations. Each time a loan was made, it was duly recorded on the corporate books and subsequent repayments were noted. The record shows that no attempt was made on the entries to conceal the withdrawal of funds (Record at 347, 393, 491, 606). Whenever a loan was made to one of the officers of the corporation, a check was issued and an account receivable would be set up or debited on the corporate books, with a credit entered on the account when a repayment was made (Record at 208, 218, 395, 396, 488, 490, 491). Although no interest on the loans was charged and no due date was indicated, the petitioners personally guaranteed corporate loans, including secondary financing on buildings owned by the corporation (Record at 283, 294).[2] The Court of Appeals noted that such loans are

[2]On numerous occasions petitioners informed their accountant of their intention to repay the loans (Recorded at 316, 317, 322). They had no reason to believe that these loans would be

[footnote continued]

familiar in close corporations and do not always reflect all indications of a commercial loan, *United States v. Pomponio*, No. 74-1758, slip op. at 8 (4th Cir. October 6, 1977) (hereinafter Appendix A).

At the time he prepared petitioners' 1969, 1970 and 1971 income tax returns, the accountant knew that each had received loans from the corporation. According to his testimony at trial, he did not include these accounts as income in the returns because he concluded that they represented bona fide loans (Record at 208, 316, 322, 417, 418). Neither petitioner ever told their accountant to omit the funds received by them as income when he prepared tax returns; the decision to omit these funds from taxable income was his alone. Aside from inferences which had to be made from the transactions themselves, the government introduced no evidence of criminal intent.

**The Partnership Losses**

In the fall of 1970 petitioners were involved in the construction of a building in the District of Columbia. It soon became apparent that additional funds would be necessary to complete the project. A potential investor, Mr. Ginsberg, indicated his willingness to invest in the project on the condition that ownership of the property be in partnership form (Record at 310). Subsequently a limited partnership was formed which included the investor and the three Pomponio brothers. In addition to

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viewed as taxable income since this same issue had been resolved in their favor administratively with the IRS years earlier. However, despite strenuous objection from counsel, petitioners' evidence on the earlier IRS proceeding was excluded at trial (Record at 348-49). The accountant also had participated as an independent C.P.A. on behalf of petitioners in the earlier IRS investigation and continued to treat these funds as loans.



the proper partnershi agreements, a nominee agreement was also executed, appointing a nominee, the Virginia Corporation, to act as agent for the partnership with respect to all matters relating to the building project (Def. Exh. No. 3, p. 13).

As nominee of the partnership, the corporation transferred beneficial ownership of the property involved to the partnership by deed (Def. Exh. No. 9). As is common in nominee agreements, the corporation conducted acts in the corporate name for the benefit of the partnership. The beneficial owners of the partnership were substantially different than the shareholders of the corporation; indeed, investor Alan Ginsberg, who possessed a 50% interest in the partnership, had no interest or ownership in the corporation. The government introduced no evidence to indicate that, following execution of the Nominee Agreement, the corporation conducted its activities with respect to the partnership on its own behalf, rather than as nominee of the partnership.

The same accountant prepared the partnership income tax return. According to his testimony at trial, he had seen the limited partnership agreement and knew of the nominee arrangement, which is common in real estate transactions, and treated the corporation as the nominee of the partnership (Record at 300, 301). The total loss reflected on the partnership return for 1971, prepared by the accountant, was allocated among the individual partners on their individual tax returns.[3] There seemed no question at the time that this loss should be attributed to the corporation since the corporation's role as an agent

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[3]Even if this loss had not been included, petitioners' tax returns for 1971 would still not have shown a taxable amount due (Gov. Exhibit No. 14).

of the partnership was firmly established between the parties. Nevertheless, petitioners were charged with defrauding the government in taking the corporation's losses on the partnership returns and were convicted.

**The Impact of Severed Conspiracy Charges on the Jury**

In addition to the charges under §7206(1) of the Internal Revenue Code, petitioners were charged with a conspiracy count in violation of 18 U.S.C. §371. This charge was ultimately severed from the trial, but not before the prosecution devoted over half of its opening statement to damaging elements of the conspiracy charge. Included in the opening statement were references to extravagant payoffs of Cadillacs and Lincoln Continentals allegedly made by petitioners to a bank vice president in charge of construction loans, references to petitioners' accountant (and chief witness) as an "unindicted co-conspirator," and payments of substantial amounts of "bribe" money (Record at 151, 152).

Both petitioners and the government expressed concern over the impact of the highly inflammatory conspiracy allegations upon the jury after the charge was severed, and requested an instruction from the court telling the jury to ignore the prosecutor's statements as to the conspiracy charges. But the trial judge refused to give specific jury instructions that would ameliorate the impression of a criminal conspiracy from the jury deliberations. The only instructions he gave to the jury were a general admonition at the commencement of the trial that opening statements are not evidence and a notification to the jury that the conspiracy charge had been severed.



**Prejudicial Pretrial and Trial Publicity**

Extensive pre-trial and trial publicity pervaded this case. Petitioners had been involved in another trial two months earlier which was covered extensively in the media. Some weeks before and continuing throughout the trial, area newspapers, radio and television maintained a high level of coverage of stories concerning petitioners' participation in the tax charges.[4] Twenty-eight articles which appeared in the press before commencement of the trial were made a part of the record in this case. Numerous motions for a change in venue were made based on the pretrial publicity problem. The trial judge, however, refused to hear the details of these articles and denied all motions for a change of venue.

At trial, petitioners submitted proposed *voir dire* questions designed to identify potential jurors who might be influenced by the adverse publicity. When the trial judge asked how many had read anything about the Pomponios, sixteen (16) of the twenty-eight (28) member panel raised their hands; however, the trial judge ignored petitioners' efforts to determine whether their extensive exposure would affect their impartiality. He refused to ask, after request, what the jurors had read or heard or whether they were familiar with the recent convictions of the defendants. Again, during trial, articles appeared daily concerning the activities of each day,

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[4]Many articles dealt with the charges involved in the first trial. The headlines were generally prejudicial and disparaging: "Two Million Dollar Pomponio Check Said Diverted to Personal Use", "Creditors Allege Pomponio Deceit"; many of the articles, including those reporting on petitioners' convictions were prominently placed on the front page. One article quoted a "court officer" as comparing the case to being like "trying Al Capone," (Record at 164).

including evidence which was excluded and information about prior convictions. But despite the court's recognition of the problem, (It stated "If they (the jury) read the paper, you have got a mistrial. It is just that simple to me."), it still refused a defense request for the court to examine the jurors as to what they had heared or read (Record at 1133).

It is significant to point out that there was a newspaper strike during the subsequent trial of Louis Pomponio Jr., on the same charges. Without the negative and sensational publicity and absent the damaging references to highly inflammatory conspiracy charges in the government's opening statement, he was acquitted on all counts.

## REASONS FOR GRANTING THE WRIT

### I.

**THE CASE PRESENTS QUESTIONS CENTRAL TO THE CONSISTENT ADMINISTRATION AND ENFORCEMENT OF FEDERAL CRIMINAL AND CIVIL TAX LEGISLATION IN THE CONTEXT OF THE APPROPRIATE STANDARD TO APPLY IN DETERMINING THE REQUIRED INTENT FOR CRIMINAL LIABILITY.**

The Court has devoted considerable effort in determining the meaning of the "willfullness" or intent required to impose criminal liability. *United States v. Bishop*, 412 U.S. 346 (1973); *Spies v. United States*, 317 U.S. 492 (1943). It is clear from these opinions that more is required in order to establish criminal intent than simply evidence which would support a finding of tax liability in civil court. If the Court of Appeals decision in the present case is allowed to stand, taxpayers may well be subject to criminal penalties even in instances where tax liability itself is in serious doubt and confusion will develop as to the role played by civil tax court



adjudications of tax liability in deciding criminal intent to defraud. The basic policy underlying decisions in *Bishop* and *Spies* would be violated by an imposition of criminal liability when the sufficiency of the evidence is measured by references to criteria and standards which should be used exclusively in civil determinations of tax liability.

In determining whether sufficient evidence existed to support a conviction, the Court of Appeals applied a civil standard for tax liability to the present prosecution. Although the court recognized that loans from close corporations often did not look as formal as other loans and that it was possible this might have been a bona fide loan, it found cases upholding civil tax liability in related circumstances. *Livernois Trust v. Commissioner*, 433 F.2d 879 (6th Cir. 1970); *Roads Materials, Inc. v. Commissioner* 407 F.2d 1121, 1125 (4th Cir. 1969). From these cases it arrived at the erroneous proposition that the jury, on the basis of similar factors, had sufficient evidence to conclude that the payments were not made as loans in these circumstances, and, even one step more removed, that therefore the required criminal intent existed.

The court's determination seemed to be based upon the rationale that if bad faith was not necessary in order to find criminal intent, then a less stringent standard could be applied. Its focus shifted to the question of whether the money received could be considered a loan or an income advance based on civil standards without a direct showing that the petitioners knew it was not a loan. The analysis, however, badly misconstrued the relation between tax liability and a criminal act. It is one thing to say that ambiguous transactions may justify imposing tax liability; it is quite another to conclude, *in*

*the absence of any indication of criminal intent*, that the taxpayer should be found guilty and imprisoned for three years. No evidence was introduced by the government bearing directly or indirectly on the petitioners' intent to defraud; rather, almost all of the evidence went to whether the monies received could be considered a loan or an advance of income.

In the civil context, moreover, the question of whether, under similar circumstances, the money received is a loan or an advance of income, is by no means clear. On this record petitioners have a strong legal argument, in support of their right, as a matter of civil tax liability, to claim the advances as loans and not as taxable income.[5] Under those circumstances, to uphold a criminal conviction is even more questionable, illustrating the obvious need for immediate clarification by this Court of the standards to be used in civil and criminal tax liability.

The same question concerning civil tax liability exists as to their claim of the partnership losses. This question revolves around a determination of whether the corporation involved was acting as a true agent for the beneficial owner of the property, in which case the owner, not the

[5]*See* Albert Ravano, T.C. Memo, 1967-170 (where the tax Court viewed the search for this intent as taking on an Alice in Wonderland quality when the stockholder is dealing with closely held corporations); and Walter Freeman, T.C. Memo, 1957-14 (where a substantial shareholder and officer in a family corporation made net withdrawals of funds during a five year period in excess of $724,000 for personal use. Although the shareholder informed the company accountant that he would eventually repay the amounts withdrawn, the court found that the shareholder's intent to repay the advances through future gambling winnings was without justification. *Even so, the advances were held to be non-taxable loans.*); 1 Mertens, Law of Federal Income Taxation, §9.21 (1969 rev.) (even where there is no record of formal authorization of a loan, a finding that a loan was made is still possible.



agent, bears the tax consequences. *National Carbide Corp. v. Commissioner*, 336 U.S. 422 (1949).[6] In this case, petitioners had a written nominee agreement and there was no evidence to indicate that the corporation conducted activities with respect to the partnership property on its own behalf rather than as a nominee. The fact that the corporation conducted its acts in the corporate name was consistent with its obligation to do so under the terms of the nominee agreement. The partnership was created at the insistence of a new investor to protect his interests, which were completely separate from any of petitioners' corporations. The lack of substantial identity of ownership of the partnership property and the corporation strongly supports nominee status. *Carver v. United States, supra.*

When it is highly questionable whether, under these circumstances, petitioners could incur civil tax liability, it is inconsistent that imposition of criminal penalties has been affirmed.[7] Even the Court of Appeals recognized that whether the corporation was acting as the true agent of the partnership was a debatable question; however, it felt that this was a question of fact for the jury, ignoring the necessity of linking petitioners' intent to deceive to any finding that the corporation was not acting as an agent of the partnership.

[6]Cf. *Paymer v. Commissioner,* 150 F.2d 334 (2nd Cir. 1945) where one corporation was regarded as a nominee for the beneficial owners of real property and another was not; *Carver v. United States,* 412 F.2d 233 (Ct. Cl. 1969) where a single corporation was held to be a nominee as to certain transactions but not to others.

[7]This Court of Appeals has indicated in the past that when a question of taxability is highly problematical, criminal intent cannot be found. *United States v. Critzer,* 498 F.2d 1160 (4th Cir. 1974).

In affirming petitioners' convictions, the Court of Appeals perhaps misunderstood this Court's prior decision in this case, *United States v. Pomponio*, 45 U.S.L.W. 3273 (October 12, 1976), reversing the Court of Appeals' earlier decision. There, this Court found the instructions to the jury adequate on the question of willfullness. While this Court did not require bad faith in showing the requisite mens rea, it did approve instructions which indicated that to find guilt beyond a reasonable doubt the defendants must have possessed knowledge of the true nature of the transactions at the time of filing the disputed tax returns. But that decision did not alter the requirement of a showing of willfullness on the part of the defendants.

The Court should review this decision in order to clarify the appropriate standards to determine criminal intent in these circumstances. It is vital that the standards in civil and criminal tax cases be clearly differentiated to avoid injustice to the taxpayer and confusion in the administration of this federal legislation.

## II.

**THE QUESTION WHETHER A TRIAL JUDGE MUST DETERMINE IF POSSIBLE PREJUDICE EXISTS AND WHETHER PROPER LIMITING INSTRUCTIONS MUST BE GIVEN TO COUNTER THE IMPACT OF SERIOUS CHARGES MADE DURING AN OPENING STATEMENT AND SUBSEQUENTLY SEVERED FROM THE TRIAL PRESENTS A CONFLICT BETWEEN THE COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THREE OTHER CIRCUITS AND THIS COURT'S DECISION IN *FRAZIER V. CUPP.***

The government's opening statement at trial concentrated heavily on conspiracy charges against petitioners



involving damaging allegations about bribery, illegal gifts and other tainted business transactions. After the opening statement, the conspiracy charge was severed from the trial. The judge, however, refused a defense request to instruct the jury to disregard the references to matters only relevant to the conspiracy charge contained in the government's opening statement. In affirming, the Court of Appeals ignored the standards established by the Third, Fifth and Eight Circuits,[8] which require a trial judge to focus upon the question of prejudice to determine whether a mistrial or proper limiting instructions are required when the prosecutor's opening statement makes extended reference to matters which are ultimately severed or excluded from the trial. Instead, the court off-handedly held that specific instructions were not required.

Underlying this Court's opinion in *Frazier v. Cupp*, 394 U.S. 731 (1969) was a recognition of the importance of determining whether or not prejudice was created when evidence, which is not later produced, is referred to in an opening statement. Relevant to the Court's decision in *Frazier* was the fact that the reference in the opening statement was brief and a proper limiting instruction was given. 394 U.S. at 736. Although no prejudice was found, the Court indicated that limiting instructions are not necessarily enough to alleviate potential prejudice, but they constitute a minimum standard in situations where the dangers of prejudice exist.

The Court of Appeals' decision gives little attention to the trial court's failure to ameliorate the prejudice

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[8] *United States v. De Rosa*, 548 F.2d 464 (3rd Cir. 1977); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *United States v. Prieto*, 505 F.2d 8 (5th Cir. 1974).

created by the government's damaging references to the conspiracy charge, despite the seriousness of the charge and the lack of a proper limiting instruction. The only instructions given by the trial judge were the initial warning that opening statements are not evidence and a notification to the jury that the conspiracy charge had been dropped.[9] According to the Court of Appeals, *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976), and *United States v. Prieto*, 505 F.2d 8 (5th Cir. 1974), dispose of petitioners' claim because they both resulted in affirming convictions despite remarks made in opening statement. However, in each of those cases, the court examined the information given to the jury to determine the prejudicial impact which could result. Indeed, in *Brown*, this inquiry was made despite the fact that the jury was instructed to ignore the prosecutor's opening statement.

In *United States v. DeRosa*, 548 F.2d 464 (3rd Cir. 1977), the Court of Appeals for the Fifth Circuit also focused on the danger of prejudice from transcripts read in the prosecutor's opening statement and later excluded. Despite counsel's failure to seek an instruction to disregard the transcripts, the court found it necessary to examine the prejudicial impact of the opening statement on the entire trial. After that examination, the court held that special circumstances[10] eliminated any prejudice that otherwise might have resulted.

[9] Although admittedly directed to defense arguments, in the charge to the jury at the end of the trial, the court, in fact, specifically invited the jury to pay attention to the opening statements of counsel.

[10] The jury sent a note to the judge asking specifically if they were allowed to consider 'evidence' presented in the government's opening statement. The judge at that point told the jury that it could not. 548 F.2d at 469.



In each of the cases dealt with by the Third, Fifth and Eighth Circuits, the situation involved less damaging information given to the jury in the prosecutor's opening statement; however, each circuit has applied a more stringent standard in determining whether the remarks may result in prejudicing the jury's determination and what cautionary instructions may be given, because each of these circuits has recognized the importance of a careful examination for potential prejudice. A dangerous precedent will be set if this decision is allowed to stand where the court is dealing with an even more serious possibility of prejudice. The Court of Appeals opinion's casual dismissal of petitioners' claim without any analysis of the obvious prejudice created in the opening statement, therefore, merits review by this Court.

## III.

### THIS COURT SHOULD REVIEW THE DECISION BELOW TO DETERMINE WHETHER THE COURT OF APPEALS CREATED AN IMPOSSIBLE STANDARD, AND ONE CONTRARY TO THAT ADOPTED IN OTHER CIRCUITS FOR DEMONSTRATING PREJUDICIAL PRETRIAL AND TRIAL PUBLICITY, IN JUSTIFYING THE TRIAL COURT'S REFUSAL TO INTERROGATE THE JURY AFTER A SHOWING OF MASSIVE PREJUDICIAL PUBLICITY.

In dealing with the recurring problem of publicity in criminal cases, the concern and focus of this Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966) was not upon the technicalities of procedure in bringing the sensational publicity to the trial court's attention, but rather on the fair administration of justice in insuring that the defendant's rights were adequately protected against the prejudicial impact of pretrial and trial publicity. The Court of

Appeals' review of the trial court's handling of the publicity in this case ignored that important directive.

There was extensive pretrial and trial publicity in this case and petitioners made every conceivable effort to bring this publicity to the court's attention, including making numerous motions, submitting the articles to the court and even commissioning a survey on its impact in the community. The Court of Appeals, however, held that these efforts were not enough and refused to require voir dire as to what the jurors had read and the conclusions they drew from their reading.[11] As a measure of the types of actions required by defendants to trigger judicial inquiry, the court created a standard which would be impossible to meet. It allows trial courts to ignore the problem altogether. Other circuits have been properly more demanding.

Both the Seventh and the Ninth Circuits have held that where the trial court's failure to make inquiries during voir dire "adequate to determine whether anyone has read or heard about the facts, and, if so, what the impact has been on his ability to serve as an impartial juror" constitutes reversible error. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied* 410 U.S. 970 (1973); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied* 400 U.S. 1022 (1971). In this case the trial judge had good reason for making an

[11]The sixteen jurors out of a panel of twenty-eight who raised their hands when asked whether they had read or heard anything about the Pomponios were never identified so that defendants might later challenge them. The Court of Appeals stated that this lack of challenge constituted a separate and alternate ground for refusing to reverse the conviction but the record clearly demonstrates that the defendants had no opportunity to postively identify those sixteen jurors (Record at 75-76).



extensive examination for possible prejudice because sixteen of his panel jurors indicated that they had heard or read publicity concerning the petitioners. Yet the trial judge inexplicably refused to follow this with an inquiry into the impact of this publicity on the jurors.

In the past, the Court of Appeals for the Fourth Circuit has also indicated that in cases of pretrial and trial publicity a voir dire is required to ascertain the impact of publicity upon the prospective jury.[12] However, in its opinion here, the Court of Appeals found that examination of the prospective jurors was unnecessary because the petitioners failed to bring particular examples of prejudicial publicity to the attention of the court. It is difficult to see, however, how petitioners could have done anything more to meet this criteria than was done in the instant case. The record is replete with examples of petitioners' attempts to bring this prejudicial publicity to the court's attention. Even the government acknowledged that "we recognize that there is a publicity problem in this case. There has been a tremendous amount of publicity . . ." (Record at 134).

Even if the petitioners' constant attempts to bring specific examples of articles concerning bribery and former convictions to the attention of the court can conceivably be viewed as a "general allegations of damaging publicity" *United States v. Pomponio*, App. A, there is conflict among the circuits as to whether such general admonitions to the jury are indeed sufficient to

[12]*United States v. Jones*, 542 F.2d 186 (4th Cir. 1976); *United States v. Pomponio*, 517 F.2d 460 (4th Cir.) *cert. denied*, 423 U.S. 1015 (1975); *United States v. Hankish*, 502 F.2d 71 (4th Cir. 1974).

justify this Court's examination of the problem.[13] There does not seem to be significant disagreement, however, among these circuit court opinions, that when specific jurors have been identified as having been exposed to prejudicial publicity, general admonitions are not sufficient. Where, as here, the jurors are clearly exposed to publicity, it is vital that uniform standards be established requiring complete examination of the extent of exposure and its impact upon the jurors. The problem is one best resolved by this Court.

## CONCLUSION

For the foregoing reasons, petitioners urge that this Court issue a Writ of Certiorari to review the decision below.

Respectfully submitted,

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[13] Compare *United States v. Perotta,* 553 F.2d 247 (1st Cir. 1977); *United States v. Liddy,* 509 F.2d 428 (D.C. Cir. 1974); *Margoles v. United States,* 407 F.2d 727 (7th Cir.), *cert denied* 396 U.S. 833 (1969) with *United States v. Bryant,* 471 F.2d 1040 (D.C. Cir. 1972) *cert. denied* 409 U.S. 1112 (1973); *Silverthorne v. United States,* 400 F.2d 627 (9th Cir. 1968), *cert. denied* 400 U.S. 1022 (1971); *Patriarca v. United States,* 402 F.2d 314 (1st Cir. 1968), cert. denied 393 U.S. 1022 (1969).

# APPENDIX

# APPENDIX A

## UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1758

UNITED STATES OF AMERICA,
*Appellee,*

*v.*

PETER POMPONIO, PAUL POMPONIO,
*Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA
*Oren R. Lewis, District Judge*

Resubmitted after remand
April 18, 1977 Decided October 6, 1977

Before RUSSELL, FIELD, and WIDENER, Circuit Judges.

Alan Y. Cole (Lee A. Schutzman; Cole and Groner, Stuart E. Seigel, Cohen and Uretz, Philip J. Hirschkop and Leonard S. Rubenstein, Philip Hirschkop & Associates, Ltd., on brief) for Appellants Peter Pomponio and Paul Pomponio; Thomas K. Moore, Assistant United States Attorney (David H. Hopkins, United States Attorney, Frank W. Dunham, Jr., Assistant United States Attorney, and Charles E. Brookhart, Attorney, Tax Division, United States Department of Justice, on brief) for Appellee.

WIDENER, Circuit Judge:

Peter and Paul Pomponio were convicted in the district court of willful evasion of federal income taxes for the years 1969, 1970, and 1971.[1] Their appeal challenging the validity of the convictions is now before us for the second time. In *United States v. Pomponio,* 528 F.2d 247 (4th Cir. 1976), we reversed on the ground that the district court inadequately instructed the jury on the essential element of willfulness. The Supreme Court granted the government's petition for certiorari and reversed in 429 U.S. 10 (1976), holding that the trial court's instruction on criminal intent was proper, thus reinstating the convictions. The case was remanded to us with instructions to consider the assignments of error raised which we found unnecessary to reach in our previous disposition. In obedience to the mandate, we have considered the remaining contentions on appeal, and conclude that the convictions should be affirmed.

The appellants, together with a third brother, Louis Pomponio,[2] owned and operated several closely-held

[1] 26 USC § 7206(1) states:

Any person who –

(1) Declaration under penalties of perjury – Willfully makes and subscribes any return, statement, or other document, which contains contains or is verified by a written declaration that it is made under the penalities of perjury, and which he does not believe to be true and correct as to every material matter;

. . .

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $5,000, or imprisoned more than 3 years, or both, together with the costs of prosecution.

[2] The trial of Louis Pomponio was severed because of his illness.



corporations engaged in real estate development in the vicinity of northern Virginia. They and their attorney, Charles Piluso,[3] were charged in a thirteen count indictment with three counts each of willfully filing false income tax returns (one count for each year in question for each defendant), and one count of conspiring to defraud the United States. The substantive counts related to the Pomponios' individual income tax returns, and consisted of: (1) failing to report as income certain monetary advances received from closely-held corporations controlled by the Pomponios; and (2) deducting from personal income a claimed partnership loss of $119,000 in 1971, which the government claimed was properly allocable to one of the Pomponio corporations.

The conspiracy count related to the alleged falsification of the corporate tax returns and, for that reason, was severed from the trial on appellants' motion following the government's opening statement, as we will discuss in more detail below.[4]

The Pomponios' position is that the advances received from their corporations were merely loans, not reportable as income, and were correctly treated as such for income tax purposes. They claim that, even if the advances should have been treated as income, the error was not willful, in that they relied on their accountant, Bates, who was responsible for preparing the returns. They further assert they were entitled to deduct as a partnership loss on their individual returns a loss sus-

[3] By order of this court, Piluso's conviction was remanded to the district court for dismissal on account of a plea bargain with the government.

[4] See part IV of this opinion.

tained by one of the Pomponio corporations, the Virginia Corporation, for the reason that, when the corporation sustained the loss, it was acting only as an agent of PHB Associates, a partnership in which the appellants were partners.

I.

## SUFFICIENCY OF THE EVIDENCE

We reject the Pomponios' defense of reliance on their accountant in treating the advances as loans,[5] as well as their reliance on the principle that, when it is problematical as a matter of law whether a taxpayer's unreported income in taxable, mere errors in judgment will not give rise to criminal liability. *United States v. Critzer,* 498 F.2d 1160 (4th Cir. 1974). Both assertions are applied to the proposition that the criminal law concerns itself only with willful violations of the tax laws, not with inadvertent errors made in good faith. *United States v. Bishop,* 412 U.S. 346, 360-61 (1973); *Spies v. United States,* 317 U.S. 492, 496 (1943). But in this case, they constitute no more than defenses which were rejected by the jury as the triers of fact; for, as to the first defense, the *sine qua non* of a bona fide non-reportable loan is the taxpayer's own intention to repay. See *Estate of Taschler v. United States,* 440 F.2d 72 (3d Cir. 1971); *Livernois Trust v. Commissioner,* 433 F.2d 879 (6th Cir. 1970); *Commissioner v. Makransky,* 321 F.2d 598 (3d Cir. 1963); 1 Mertens, *Law of Federal Income Taxation* § 9.21. As to the second defense, that loans which are not actually such are income, is beyond argument. If the Pomponios intended to repay the advances, the sums advanced to

[5]See, e.g., *United States v. Mitchell,* 496 F.2d 285, 288 (4th Cir. 1974).



them did not constitute reportable income, as the jury was instructed. While there may be instances in which an accountant's interpretation of the tax laws can justifiably be relied upon by a taxpayer, even if erroneous, see *United States v. Pechenik,* 236 F.2d 844 (3d Cir. 1956), certainly these cannot include cases where the only real question bearing on the correctness of the returns, as here, is one of the taxpayer's own intent.

The Pomponios knew, at the time they signed their tax returns, whether they had received funds from their corporations with the intention of repaying them. On the question of their own state of mind, a matter of fact, they can hardly claim reliance on their accountant, for it was incumbent upon them to inform Bates that the advances were not loans if they had no intention to repayment. As one court has repeated, "a taxpayer cannot shift the responsibility for admitted deficiencies to the accountants who prepared his returns if the taxpayer withholds vital information from his accountants. . . ." *United States v. Lisowski,* 504 F.2d 1268, 1272 (7th Cir. 1974); *United States v. Scher,* 486 F.2d 319, 321 (7th Cir. 1973).

The nature of that intent was a question of fact for the jury's resolution. See *Livernois Trust,* at 883. In this criminal prosecution, the principal question that presently concerns us with respect to the advances is whether the evidence was sufficient for the jury to have found beyond a reasonable doubt that the advances were not loans, that is, that no intent to repay them existed, and that the defendants knew they were not loans. We think the evidence was ample to sustain such findings. For example: although the advances were treated as loans on the books of the Pomponio corporations, it is undisputed that no date was fixed for repayment, and

no notes were executed by the Pomponios as evidence of indebtedness; neither was any security given to guard against the contingency of default, nor was interest charged or paid with respect to the advances.[6] We have approved reference to similar criteria in distinguishing loans from contributions to capital for the purpose of bad debt deductions, see *Road Materials, Inc. v. Commissioner,* 407 F.2d 1121, 1125 (4th Cir. 1969), and the jury here was entitled to conclude on the basis of such factors that the loans, approximately in the aggregate 2.5 million dollars, in the three pertinent years, were not made as loans in these circumstances.

We realize that a course of self-dealing between individuals and their closely-held corporations must be considered from both sides. On one hand, the need to examine closely the substance of the transactions, as well as the form in which they are couched, is especially acute; thus, the fact that the advances were formally treated as loans on the corporate books is not controlling. *Road Materials, Inc., supra.* On the other hand, the possibility exists that bona fide loan transactions may be carried out in the informal manner presented here within closely held corporations. But these are circumstances for the jury to have weighed and have less force on appeal where our reviewing role as to factual matters is limited to ascertaining whether the jury's verdict is supported by substantial evidence reviewed in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. Sherman,* 421 F.2d 198, 199 (4th Cir.), cert. den. 398 U.S. 914 (1970).

The inclusion of the 1971 loss on account of the PHB

[6] For a discussion of these and other factors, see 1 Mertens, *Law of Federal Income Taxation* § 9.21 and cases cited therein.



partnership requires inquiry into this additional basis for conviction on the 1917 tax evasion counts.

The Virginia Corporation was formed by the Pomponios in 1970 for the purpose of constructing a building on land to be acquired in the District of Columbia. The defense contends that, as a condition for providing additional, necessary financing for the project after construction had commenced, a New York financier named Ginsberg required that ownership of the land and building be placed in partnership form. Thus a limited partnership, PHB Associates, was formed, with the three Pomponio brothers, attorney Piluso, and Ginsberg as partners, as well as PHB Realty, Inc.

In addition to the limited partnership agreement, a nominee agreement was executed which provided that, in this real estate transaction, the Virginia Corporation would act as an agent for PHB, and would hold title to any real property belonging to the partnership. Although it appears that a deed was executed conveying the Washington, D.C. property from the Virginia Corporation to PHB Associates, record as well as actual title to the property was retained in the corporation's name. The deed to PHB was never recorded.

Accountant Bates testified that, based on the limited partnership agreement furnished him by the Pomponios, and acting pursuant to their instructions, he treated the Virginia Corporation as the agent of PHB, disregarding the corporation as a taxable entity and allocating its 1971 loss of over $950,000 to the partnership. Each defendant's 1971 tax return reflected his share of the total partnership loss.

The government challenged the propriety of the deduction, claiming the loss was that of the Virginia

Corporation, and could only have been deducted by that corporate entity. It is not disputed that, where a true agency relationship exists, the agent may be disregarded for tax purposes and its profits or losses attributed to the principal. *National Carbide Corp. v. Commissioner,* 336 U.S. 422 (1949); see *Moline Properties, Inc. v. Commissioner,* 319 U.S. 436 (1943). The relevant factors in determining whether a corporate agent must be passed over for tax purposes in deference to its principal relate not to the mere fact of whether or not a formal contract of agency has been executed, *National Carbide,* p. 436, but whether the business purpose of the claimed agent is to carry on "the normal duties of an agent." Id. at 437, including the "usual incidents of an agency relationship." Id. at 439.

Judge by this test, we are satisfied that the evidence was sufficient for the jury to have found beyond reasonable doubt that the Virginia Corporation's loss was improperly allocated to the PHB partnership, and that the defendants were aware of that fact when they signed their 1971 tax returns. With respect to the propriety of the deduction, the jury was presented with substantial evidence that the Virginia Corporation continued to operate as an independent corporate entity, and not as an independent corporate entity, and not as an agent for PHB.

For example, Virginia Corporation bank records, introduced by the government and unexplained, fail to indicate that any payments were made by the corporation to its principal, PHB Associates.[7] In addition, throughout

[7]Check #424, in the amount of $7,708.00, dated June 30, 1971, and paid to the order of a New York City law firm, does contain this cryptic reference: "Re: P.H.B. Associates." The record offers no explanation for the check.



extensive negotiations with the General Services Administration over the lease of the Washington real estate, the Virginia Corporation did not reveal that it was acting as agent and not as principal; no reference of any kind was made to PHB or to the unrecorded deed transferring title to PHB from the corporation. One exhibit is particularly instructive: in making a GSA Form 1364 "Proposal to Lease Space to the United States of America," Paul Pomponio twice listed the Virginia Corporation as the "Offeror," and in blank #14, "Offeror's Interest in Property (Owner, agent, etc.)," Pomponio twice responded "Owner."

This evidence, and more, such as testimony that PHB Associates had no bank account; that the corporation had retained record title as of two days before trial; and had itself paid the expenses listed on the partnership return, provides strong support for the verdict below.

The jury also heard testimony that PHB Associates, to the knowledge of the defendants, was not, and could not have been validly formed in accordance with the limited partnership agreement. The agreement specified that all stock of the Virginia Corporation would be contributed to the capital of PHB, and, according to the defendants' own version of the facts, the only purpose for which PHB was formed was to assume ownership of the Washington property in place of the corporation as a condition of obtaining Ginsberg's loan. But the defendants knew in advance that PHB could not, as it did not in 1971, acquire possession of the corporation's stock, because they had previously placed it in an escrow, which existed until 1972, as collateral for a debt unrelated to these proceedings, and we are not told of any transfer of ownership subject to the escrow. Moreover, the partnership could not have acquired an unencumbered fee title

to the Washington property, as called for in the partnership agreement, because, as the defendants must have known, the individual from whom they had purchased the property held a deed of trust in his favor on the land. While these last facts are, to be sure, circumstantial evidence, they weight in the government's favor.

Viewing the facts in the light most favorable to the government, the jury could certainly have concluded that the Virginia Corporation was never intended to become the agent of the partnership, rather that it remained the principal, and, indeed, that the formation of PHB was a sham.

II.

PUBLICITY BEFORE AND DURING TRIAL

Of the many[8] assignments of error raised by the Pomponios, they emphasize the district court's refusal to conduct an individualized, in camera voir dire examination to probe the effect of pre-trial publicity on each member of the venire, and its refusal to question each juror at the conclusion of the trial concerning the effect of publicity during the trial.[9]

[8] The defendants have filed 14 principal assignments of error, five of which are subdivided for a total of 24 grounds for reversal. We have considered the assignments of error not especially mentioned here and are of opinion they are without merit. The main assignment mentioned oral argument was the sufficiency of evidence in its various aspects, but we do not infer any assignments were waived for others were later emphasized.

[9] Appellants also assert as error the trial court's denial prior to trial of a motion for change of venue. In *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), the Supreme Court implied that a change of venue is desirable, and perhaps mandatory protection "where there is reasonable likelihood that prejudicial news prior

[footnote continued]



On several occasions we have defined the scope of a trial judge's obligation to make particularized inquiries concerning the effect of extensive press coverage both prior to and during a criminal trial.

In *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970), on facts very similar to those before us here, we approved the trial judge's refusal to question veniremen individually about what each had heard or read about the case, a prosecution for conspiracy to commit bribery. We emphasized that, "[t]here were no specified headlines, news reports, or editorials brought to the attention of the trial judge as possible sources of prejudice." 423 F.2d at 1344. In these circumstances, general questions addressed to the venire as a whole, requiring each member to assess his ability to render a just verdict based only on the evidence adduced at trial, were deemed sufficient.

While we reversed in the more recent cases of *United States v. Hankish*, 502 F.2d 71 (4th Cir. 1974), and *United States v. Pomponio*, 517 F.2d 460 (4th Cir.), cert. den. 423 U.S. 1015 (1975), a case involving these same defendants, the facts were different. In *Hankish*, an article appeared during trial characterizing the defendand as a "Wheeling [West Virginia] rackets figure," and alleging that he "directed operations" of a theft ring,

to trial will prevent a fair trail." We do not find, however, any such likelihood in this case. There was no *Sheppard*-type publicity such as "editorials or slanted articles demanding conviction," *United States v. Sawyers*, 423 F.2d 1335, 1343 (4th Cir. 1970), and appellants thus did not rebut the presumption of impartiality of prospective jurors. *United States v. Morlang*, 531 F.2d 183, 187 (4th Cir. 1975). Indeed, the record does not show the defendants even filed affidavits that they would be unable to get a fair trial. The questions the defendants wanted the court to ask each individual juror were: "How many articles did you read? Did you follow it daily? What type of articles did you read?" No specific article was pointed out to the court as especially damning.

unrelated to the ongoing prosecution.[10] We held that the trial judge's refusal to ascertain from each juror whether he had read this prejudicial article, which had been called to the court's particular attention by defense counsel, constituted reversible error.

Of similar import is our holding in *Pomponio, supra,* where we explicitly stated, "[s]uch articles must be brought to the court's attention, as these were by the attorneys, to enable it to make an initial determination as to whether the information is in fact prejudicial. . . ." 517 F.2d at 463.

The analysis we have consistently employed in cases of this nature requires the party seeking an individualized inquiry into the effect of publicity to bring specific examples of allegedly prejudicial publicity to the attention of the trial court. Only then can the court determine if the publicity is of a sufficiently prejudicial nature to mandate individual questioning of jurors of veniremen. *United States v. Jones,* 542 F.2d 186 (4th Cir. 1976). General allegations of damaging publicity are sufficiently dealt with by questions and admonitions addressed to the panel as a whole. 542 F.2d at 195, n. 11; see *United States v. Thomas,* 463 F.2d 1061 (7th Cir. 1972); *Margoles v. United States,* 407 F.2d 727 (7th Cir.), cert. den. 396 U.S. 833 (1969).

We agree with the government that, because the defendants here failed to bring specific items of allegedly damaging publicity to the court's attention to enable it to determine independently whether individual questioning was either necessary or desirable, the court had no obligation to conduct such questioning. The defendants simply dumped the multitude of articles on the court,

[10] 502 F.2d at 76.



about 110 at one time and 28[10a] at another, apparently hoping to make an impression on the basis of quantity alone, see *United States v. Jones, supra; United States v. Hankish, supra,* and inviting error when they asked the trial court to wade through the voluminous items of publicity without even the benefit of counsel's help in pinpointing objectionable matter.

The steps taken by the district court were sufficient. First, a continuance of one month was granted on defendants' motion (defendants filed motions the same day asking for a change of venue and a continuance.) In its voir dire examination, the court strenuously admonished the venire that, if any prospective juror had the slightest doubt of his ability to disregard anything he had heard or read about the case, and to decide the case on the basis of the evidence only, he must give the defendants the benefit of that doubt and step aside. See *Irvin v. Dowd,* 366 U.S. 717 (1961); *United States v. Sawyers, supra.* During trial, the judge instructed the jury at the close of each day's session to refrain from reading any news broadcasts.

On the facts of this case, especially where the community was by no means flooded with sensational journalism of the *Sheppard v. Maxwell*[11] variety. *Sawyers,* p. 1344, no more was required of the district court on the basis of the defendants' general allegations of prejudicial publicity occurring prior to the trial.

We also note the defendants' did not challenge to the

[10a] The 28 articles, the latest of which was published February 7, 1974, were filed with the court February 11, 1974. The jury was impaneled until March 19, 1974.

[11] 384 U.S. 333 (1966).

favor, individually or collectively, any of the jurors who had indicated he had read something about the case. The absence of such a challenge in our opinion constitutes a separate and alternate ground for refusing to reverse the convictions because of pre-trial publicity when, as here, the claim is that the jury was infected by the pre-trial press. *Frazier v. United States,* 335 U.S. 497 (1948); Beale's *Criminal Pleading and Practice,* §245 (1899). See *Queen v. Hepburn,* 7 Cranch 290 (Feb. Term 1813).

## III.

## ALLEGED TRIAL COURT INTERFERENCE WITH THE TRIAL

Appellants characterize the district court's role in the trial as "interference," and claim that this "interference in the trial process was so pervasive and so prejudicial that appellants could not receive a fair trial." They further characterize the court's "interference" as assuming "the role of the prosecuting attorney," and point out twenty examples extracted from the trial transcript. Three of these twenty instances have been selected for our particular attention by appellants as those they say are worst examples of the trial court's interferences. We have considered all the claims and conclude that no error has occurred.

The first of the three interferences expressly pressed by appellants occurred during the government's direct examination of H. Burton Bates, the chief accountant for the Pomponios. At one point the trial court directed the government's attorney to ask Bates "why he used corporate figures to make a partnership return." The court further stated, "If you don't, the Court will." The following then transpired:

Question by the prosecutor:



Q. The Court has directed me to ask why you used corporate figures to prepare a partnership return.

A. I was furnished with a partnership agreement at the time the tax return was done and that partnership agreement indicates that the partnership was the acting party and the corporation was acting as an agent or nominee for the partnership, and under those instructions I prepared it under the partnership law.

THE COURT: It was in the agreement or did any of the POmponios [sic] so instruct you?

THE WITNESS: It is in the partnership agreement and they also told me.

THE COURT: All right. So you did it – Theyhanded [sic] you an agreement and told you to do it that way?

THE WITNESS: Told me the partnership had replaced the corporation and here is the partnership agreement and –

THE COURT: All right.

THE WITNESS: – you should make it up as a partnership.

THECOURT [sic] : All right.

Appellants find from this colloquy that the court was "seeking to create the impression of wrongdoing," and that "the court, while purporting to sum up Bates' testimony, twisted it." We do not agree. There is nothing here that indicates the court was seeking to create any impression. What appears is merely a question by the court eliciting a response from Bates as to the role of the Pomponios, if any there were. Further, the trial court's question to Bates that "they handed you an agreement

and told you to do it that way" does not at all appear to be a twisted or distorted account of Bates' testimony that "[i]t is in the partnership agreement and they also told me."

The second example cited by appellants occurred during the cross-examination of Bates. Defense counsel was questioning Bates as to why he treated the advances from the corporations to the appellants as loans, rather than as reportable income. Bates' response and the trial court's questions of Bates are found on pages 315-319 of the transcript. Appellants characterize the court's questioning here of Bates as "badgering," and add that the "net impression left" from the exchange "could only have been that the defendants could not honestly have treated the advances as loans at all." Again, we find no error. The court's questions to Bates were directed toward discovering how the accountant understood that the advances were loans to be repaid, and what conversations Bates may have had with the Pomponios that led to the understanding. No badgering appears, and we do not think the court assumed the role of the prosecuting attorney. Thus, we do not find the trial court created any impressions adverse to defendants. Such impressions, if any there were, derived solely from the responses of the accountant and did not differ from impressions that may be created from any witness' response to a relevant question.[12] Without copying in the opinion the pages referred to, it sufficies to say the tone of the questioning

[12] "[The trial court] should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt to help one side or the other." *Simon v. United States*, 123 F.2d 80, 83 (4 th Cir.), cert. den. 314 U.S. 694 (1941).



in this and the following example are equally as innocuous as is the first cited.

The final instance stressed by appellants transpired during the trial court's examination of Bates after the government and defense had finished their questioning of Bates. The record, transcript p. 459-461, according to appellants, reveals that the trial court "stressed only the guilt of defendants." We find no such stress revealed by the transcript. The court's questioning of Bates as to whether there was any pattern to the advances made to the Pomponios or payments from them seems to have been thoroughly impartial; no impermissible advocacy is revealed. In fact, the effect of Bates' answers to the effect that there was no pattern may have been exculpatory, and one case has so implied.[13]

There are two points we have found in the transcript where the trial court in its extensive charge referred to the disputed advances as "items of income," when whether or not these advances were in fact reportable items of income was a matter for the jury. But in view of the trial court's numerous instructions to the jury that it was the government's contention that the advances were reportable income (Appellants' Combined Volume II at 869, 872, 877, 882), that the jury alone should determine whether the advances were reportable income (Appellants Combined Appendix Volume II at 868, 878, 881) and that bona fide loans were not reportable income (Volume

[13] The jury may have thought that the absence of any correlation between the amounts of the advances and the equity interests of the recipients in the corporations indicated that the advances were more likely to be bona fide loans than taxable dividends as claimed by the government. *Clark v. Commissioner*, 266 F.2d 698, 711 (9th Cir. 1959) (withdrawals in proportion to shareholders' respective interests indicates dividend, not loan status.)

II at 868, 869, 881, 882, 889, 890, 891), together with a standard reasonable doubt instruction (Vol. II at 873, 874), we do not think there is a reasonable likelihood the court was misunderstood or the jury confused.

IV.

The final points stressed by appellants are the trial court's allegedly improper regulation of the testimony of extensive comments upon charges which had been severed from the trial, but which had been contained in the government's opening statement, without a limiting instruction to the jury. . . ."

The regulation of Bates' testimony requires, we think, little comment. In addition to their complaint about the testimony previously quoted, defendants say the trial court too explicitly questioned Bates on another matter. Bates had testified that the advances were loans to be repaid and that he had so understood from the defendants. The court asked Bates for specific conversations with the defendants when they had so advised him. Upon receiving indefinite answers, the court pressed for them. We do not think this is error, or that the judge did any more than try to bring out the facts of the case. *Simon, supra.*

*United States v. Brown,* 540 F.2d 364 (8th Cir. 1976), and *United States v. Prieto,* 505 F.2d 8 (5th Cir. 1974), dispose of defendants' remaining ground emphasized. In his opening statement, the prosecutor in each of those cases discussed the expected testimony with respect to a count which was later reversed. In *Prieto,* the trial judge did not instruct the jury to disregard the statements, while in *Brown* he did. The outcome was the same in both cases and affirmance resulted. Here, as in both those cases, there was no improper conduct of the procedures



involved. Also, in the case of *United States v. DeRosa,* 548 F.2d 464 (3d Cir. 1977), the court affirmed a conviction despite a too detailed opening statement of damaging facts the prosecutor expected to prove but was later unable so to do because of their exclusion as evidence. *DeRosa* affirmed the conviction, although the conduct of the prosecutor was criticized, because of the court's later instruction to disregard the statement.

We are of opinion that the trial judge here gave adequate limiting instructions. The court told the jury in advance that the opening statements were not evidence; when it severed the conspiracy charge, it told the jury no longer to consider it; and in its charge near the end of the trial, the court repeated that the opening statements were not evidence. We express no opinion on a case in which no such instructions are given.

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## APPENDIX B

UNITED STATES v. PETER POMPONIO ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. No. 75-1667. Decided October 12, 1976.

Per Curiam

After a jury trial, respondents were convicted of willfully filing false income tax returns, in violation of 26 U.S.C. §7206(1).[1] Based on its reading of United States

[1] Section 7206 provides:

"Any person who

"(1) . . . Willfully makes and subscribes any return statement, or other document, which contains or is verified by a written declara-

[footnote continued]

v. Bishop, 412 U.S. 346 (1973), the Court of Appeals held that the jury was incorrectly instructed concerning willfullness, and remanded for a new trial. 528 F.2d 247 (CA 4 1975). The United States petitioned for certiorari. We reverse.

The respondents were charged with falsifying tax returns in two principal ways: (1) they allegedly caused corporations they controlled to report payments to them as loans, when they knew the payments were really taxable dividends; and (2) they allegedly claimed partnership losses as deductions knowing that the losses were properly attributable to a corporation. Their defense was that these transactions were correctly reported, or at least that they thought so at the time.

The jury was instructed that respondents were not guilty of violation §7206(1) unless they had signed the tax returns knowing them to be false,[2] and had done so

that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . .

* * *

"shall be gulity of a felony . . . ."

[2]We agree with the Court of Appeals that the instructions on this point were "full and complete." 528 F.2d at 249-250. The jury was told the government contended that respondents "couldn't claim this [the partnership losses] as a deduction . . . because by so doing they would know that they were filing a false report of their total gross income." Later the jury was instructed that, if they found the loans were incorrectly reported, they must also find that the return was "made willfully and with the specific intent and knowledge at the time they made it that it was in fact a false return." In explaining intent, the trial judge said that "[t]o establish the specific intent the Government must prove that these defendants knowingly did the acts, that is, filing these returns, knowing that they were false, purposely intending to violate the law." The jury was told to "bear in mind the sole charge that you have here, and that is the violation of 7206, the willful making of the false return, and subscribing to it under perjury, knowing if not to be true and to [sic] all material respects, and that and that alone."



willfully. A willful act was denied in the instructions as done "voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law." Finally, the jury was instructed that "[g]ood motive alone is never a defense where the act done or omitted is a crime." and that consequently motive was irrelevant except as it bore on intent. The Court of Appeals held this final instruction improper because "the statute at hand requires a finding of bad purpose or evil motive." 528 F.2d, at 249. In so holding, the Court of Appeals incorrectly assumed that the reference to an "evil motive" in United States v. Bishop, supra, and prior cases meant something more than the specific intent to violate the law described in the trial judge's instructions.

In Bishop we held that the term "willfully" has the same meaning in the misdemeanor and felony sections of the Revenue Code and that it requires more than a showing of careless disregard for the truth.[3] We did not, however, hold that the term required proof of any motive other than an intentional violation of a known legal duty. We explained the meaning of willfulness in §7206 and related statutes:

"The court, in fact has recognized that the word 'willfully' in these statutes generally connotes a volun-

[3]The Court of Appeals in Bishop held that the evidence under the misdemeanor statute "need only show unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed." 455 F.2d 612, 615 (CA9 1972). This Court rejected the view that this lesser degree of culpability was required for a violation of the misdemeanor statute, and held on the contrary that "Congress used the word 'fillfully' to describe a constant rather than a variable in the tax penalty formula." 412 U.S. at 359-360.

tary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as 'bad faith or evil intent,' [United States v.] Murdock, 290 U.S. [389] at 398, or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer,' Spies [v. United States], 317 U.S. [492] at 498, or knowledge that the taxpayer 'should have reported more income than he did.' Sansone [v. United States], 380 U.S. [343] at 353. See James v. United States, 366 U.S. 213, 221 (1961); McCarthy v. United States, 394 U.S. 459, 471 (1969)." 412 U.S., at 360.

Our references to other formulations of the standard set forth in the first sentence of the quoted paragraph. On the contrary, as the other courts of appeals to consider the question have recognized, willfulness in this context simply means a voluntary, intentional violation of a known legal duty. United States v. Pohlman, 522 F.2d 974, 977 (CA8, 1975) (en banc), cert. denied, 423 U.S. 1049, United States v. McCorkle, 511 F.2d 482 484-485 (CA7, 1975) (en banc), cert. denied, 423 U.S. 826; United States v. Greenlee, 517 F.2d 899, 904 (CA3 1975), cert. denied, 423 U.S. 985; United States v. Hawk, 497 F.2d 365, 266-269 (CA9 1974), cert. denied, 419 U.S. 838. The trial judge in the instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary.

As an alternate ground for ordering a new trial, the Court of Appeals held that respondents were entitled to instructions exonerating them if they believed that the payments to them were loans and that the losses belonged the partnership, 528 F.2d, at 250. Our inspection of the record indicates that such instructions were given and



that they were adequate.[4]

The respondents' other allegations of error which the Court of Appeals found it unnecessary to reach should be considered by that court in the first instance.

The judgment of the Court of Appeals is reversed and the case remanded for further proceedings consistent with this opinion.

* * *

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[4]The instructions set forth in n.2, supra, by requiring knowledge that the returns falsely reported the transactions, implicitly required knowledge of the true nature of the transactions. In addition, the jury was instructed with respect to the loans that "if you do find that they were not bona fide loans then you must next determine whether or not the defendants knew at the time they were withdrawing this money that it was not a loan . . . . In other words, you should determine whether they knew that, as I have told you, that is an essential element." With respect to the partnership losses, the jury was told that the government claimed that respondents "knew that they couldn't transfer [a certain asset] to a partnership, and, therefore, when they couldn't transfer if they couldn't take the benefits of any losses sustained by the partnership in question . . . ."

* * *

APPENDIX C

UNITED STATES OF AMERICA,
*Appellee,*

*v.*

PETER POMPONIO, *et al.,*
*Appellants.*

No. 74-1758

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

Aruged Feb. 6, 1975

Decided Dec. 16, 1975

* * *

Albert J. Ahern, Jr., Baileys Crossroads, Va. for appellant Charles J. Piluso.

Alan Y. Cole, Washington, D.C. (See A. Schutzman, Cole & Groner, Stuart E. Seigel and Cohen & Urtez, Washington, D.C. on brief), for appellants Peter Pomponio.

Thomas K. Moore, Asst. U.S. Atty. (David H. Hopkins, U.S. Atty. and Charles E. Brookhart, Atty., Tax Div., U. S. Dept. of Justice, on brtief), for appellee.

Before RUSSELL, FIELD and WIDENER, Circuit Judges.

WIDENER, Circuit Judge:

Peter, Paul, and Louis Pomponio are brothers who were business associates involved in the development, construction, and operation of high-rise office and apartment buildings in the District of Columbia-Northern Virginia area. Charles Piluso was their attorney. The four were originally indicted on September 24, 1973 on several



counts of income tax evasion and conspiracy to commit income tax evasion. This indictment was superseded by another grand jury indictment on November 14, 1973 in which they were each indicted on three counts of filing a false income tax return in violation of 26 U.S.C. § 7206(1) and jointly indicted for conspiracy and others to defraud the United States by impeding the ascertainment and collection of income taxes and withholding taxes by various means in violation of 18 U.S.C. § 371. Due to illness. Louis Pomponio was severed from the case and tried separately. Prior to trial, the United States struck from the conspiracy indictment that portion of it dealing with withholding taxes and several of the means alleged to have been used.

The trial commenced on March 19, 1974. After the jury was empaneled and the government made its opening statement, the court severed Count I, the conspiracy count. The defendants were then tried and each was convicted on three counts of filing a false return. From these convictions they appeal.

The income tax fraud alleged was principally based on two allegations: (1) the various corporations owned or controlled by the defendants would list as loans amounts paid to the defendants, which amounts were actually income taxable to the defendants; (2) the defendants deducted losses attributed to a partnership which actually did not have the losses to attribute to the partners because such losses were actually those of a corporation.

The defendants allege numerous errors, including several involving the jury instructions. We are of opinion that the court's instruction as to motive was incorrect as used in the case before us, and that it erred in refusing to give a requested instruction on good faith belief of the defendants as to the nature of the loans especially and

the deductibility of the partners losses. We express no opinion on the other issues raised, but their very numbers may indicate that many of them are patently without merit.

The offense charged was that the defendants "willfully" made and subscribed income tax returns to be filed with Internal Revenue Service, which were verified by written declarations ma de under penalties of perjury, and which the defendants did "not believe to be true and correct as to every material matter," in violation of 26 U.S.C. §7206(1). The disputed instructions turn on the meaning of the word willfully.

The Supreme Court recently dealt with the meaning of willfully in 26 U.S.C. §7206. *United States v. Bishop,* 412 U.S. 246, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973), involved a dispute as to whether willfully meant the same in 26 U.S.C. §7207, a misdemeanor statute, as it did in 26 U.S.C. §7206, a felony statute. The court held that the meaning was the same in both and went on to clarify and reaffirm its earlier interpretation of willfully as "the bad purpose or evil motive described in *Murdock,* supra [*Murdock v. United States,* 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933)]." *Bishop* at p. 361, 93 S.Ct. at p. 2017. See also *Spies v. United States,* 318 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943).

*Murdock* involved a willful failure to supply information to the revenue service. The court held that willful, when used in a criminal statute, ". . . generally means an act done with a bad purpose . . .; without justifiable excuse . . .; stubbornly, obstinately, perversly . . . the word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the



right to act . . ." *Murdock,* 290 U.S. 594, 54 S.Ct. at 225. (Citations omitted). In connection with finding a willful failure to observe the directions of a statute as to furnishing information to the revenue service, the court stated the defendant had a right to have the "absence of evil motive submitted to the jury," *Murdock* at 396, 54 S.Ct. at 226 and the jury might acquit if it found the refusal to furnish the information was "not prompted by bad faith or evil intent." The *Murdock* court approved a reversal of a conviction because the defendant was refused a jury charge that they should consider whether the defendant's refusal to supply information was in "good faith and based upon his actual belief" in considering whether the refusal was "willful." See *Murdock,* p. 393, 54 S.Ct. 223, 225, for the form of the instruction.

[1] In the case at hand, the district court gave detailed instructions as to the meanings of intent and motive. Motive was described as "what prompts one person to act or fail to act," while intent "refers only to the state of mind with which the act is done or omitted." The court then went on:

> "Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent."

In light of *United States v. Bishop,* this instruction was improperly used here. Although the instruction was given to explain the difference between intent and motive, and would have been correct in most criminal trials, the Supreme Court indicated in *Bishop* that the statute at hand requires a finding of a bad purpose or evil motive. Since good faith is required by *Murdock,* as referred to in *Bishop,* to be considered by the jury in determining

whether or not the act charged was done willfully, excluding good motive from the consideration of the jury in a case for violation of 26 U.S.C. §7206(1) is inconsistent with *Bishop*. We note that in a considered *dictum* we have stated that, in a discussion of "willfully" under the same series of statutes, "[i]t is possible that purpose and motivation may be found by a jury to negate willfulness." *United States v. Snider,* 502 F.2d 645, 657 (4th Cir. 1974). Accord, *United States v. Pohlman,* 510 F.2d 414 (8th Cir. 1975); but see *United States v. McCorkle,* 511 F.2d 482 (7th Cir. 1975).

[2] The district court gave full and complete instructions to the effect that the jury could convict only if it found that the defendants had signed the returns knowing them to be false. However, since there was evidence which may have tended to show that the defendants might have believed the payments to be loans, they were entitled to an instruction on that point. *United States v. Mitchell,* 495 F.2d 285 (4th Cir. 1974). The same reasonsoning applies to the claimed losses on account of the partnership. Since a good faith belief would tend to negate the elements of willfulness and knowledge, they were entitled to an instruction similar to that described in *Murdock v. United States,* 290 U.S. 389, 393, 54 S.Ct. 223, 78 L.Ed. 381 (1933), and they were entitled to have motive not excluded from jury consideration.

Reversed and remanded for a new trial.

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No. 77-898

# In the Supreme Court of the United States

OCTOBER TERM, 1977

PETER POMPONIO AND PAUL POMPONIO, PETITIONERS
*v.*
UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS





257-159—78——1

# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 24a-28a) is reported at 528 F. 2d 247. The opinion of the court of appeals (Pet. App. 1a-19a) on remand from this Court is reported at 563 F. 2d 659.

### JURISDICTION

The judgment of the court of appeals was entered on October 6, 1977, and a petition for rehearing filed on behalf of petitioners was denied on November 22, 1977. The petition for a writ of certiorari was filed on December 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals properly evaluated the sufficiency of the evidence.

2. Whether the district court correctly instructed the jury with respect to its severance of the conspiracy count.

3. Whether the district court correctly refused to conduct an *in camera voir dire* examination of each prospective member of the jury with respect to pretrial publicity when petitioners cited no example of prejudicial publicity.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Peter Pomponio and Paul Pomponio, together with their attorney, Charles J. Piluso,[1] were convicted on three counts of filing false income tax returns for 1969 through 1971, in violation of 26 U.S.C. 7206(1) (Pet. App. 2a).[2] The evidence established that petitioners, together with Piluso, had collectively understated their taxable income by approximately two and one-half million dollars during the years in question

[1] Piluso's conviction was dismissed as a result of a plea bargain with the government (Pet. App. 3a, n. 3).

[2] The court of appeals' opinion, while citing the correct statutory reference (Pet. App. 2a, n. 1), erroneously stated that petitioners were convicted "of willful evasion of federal income taxes" for the three years. In fact, as the court of appeals later recognized (Pet. App. 3a), petitioners were convicted of "willfully filing false income tax returns."



(Tr. 594–603).[3] The district court sentenced petitioners to concurrent three-year terms of imprisonment, and fined them $5,000 on each count (R.A. 101–102).

The court of appeals reversed the convictions on the ground that the district court had inadequately instructed the jury on the element of willfulness (528 F. 2d 247). This Court reversed the decision of the court of appeals (429 U.S. 10). It held that the trial court had correctly instructed the jury as to willfulness, and it remanded the case to the court of appeals to consider petitioners' other assignments of error. The court of appeals then affirmed the convictions (Pet. App. 1a–19a).

Petitioners are brothers who were engaged in the development, construction, and operation of high-rise office and apartment buildings in the District of Columbia and Northern Virginia. The evidence established that petitioners had improperly treated amounts paid to them by various corporations that they owned or controlled as loans, when petitioners knew that the payments were taxable dividends; it further showed that petitioners had improperly deducted certain losses as partnership losses even though they knew that the losses had not been incurred by their partnership but by a corporation (Pet. App. 3a).

At trial, petitioners claimed that the amounts paid to them by their corporations were not dividends but

[3] "Tr." and "R.A." respectively refer to the transcript of trial proceedings and the combined appendix filed in the court of appeals.

loans that they intended to repay at some future date, and that the losses that they had deducted were properly attributable to their partnership (Tr. 976–993, 1018–1039). For a number of years, petitioners had periodically withdrawn substantial amounts of cash from their various corporations and used the funds for their personal expenses. The net advances to petitioners and Piluso for the three prosecution years amounted to more than $2.5 million. Petitioners did not dispute that they withdrew the money or that they applied it to their personal use (Tr. 200–b to 200–c, 200–e). The only question was whether the advances were loans, as petitioners claimed, or whether they took the money without intending to repay it or with the knowledge that they could not repay it. In the latter two instances, petitioners should have reported as income the amounts withdrawn from their corporations. The evidence at trial established that "although the advances were treated as loans on the books of the Pomponio corporations, * * * no date was fixed for repayment, and no notes were executed by the Pomponios as evidence of indebtedness; neither was any security given to guard against the contingency of default, nor was interest charged or paid with respect to the advances" (Pet. App. 5a–6a).

The evidence relating to the partnership losses claimed by the petitioners in their 1971 returns showed that petitioners had claimed losses that were properly those of the Virginia Corporation and not of the PHB Associates partnership. The Virginia Corporation was formed by petitioners in 1970 for the purpose of constructing a building on land to be acquired in the District of Columbia. According to petitioners, PHB Associates was formed to assume ownership of the real estate in the place of the Virginia Corporation. A nominee agreement provided that the Virginia Corporation would act as an agent for PHB, and would hold title to any real property belonging to the partnership (Pet. App. 7a.)



The prosecution's evidence further demonstrated that although a deed was executed conveying the real estate from the Virginia Corporation to PHB Associates, the corporation continued to retain record as well as actual title to the real estate (Pet. App. 7a).[4] Moreover, the corporation's bank records did not indicate any payments made by the corporation to PHB Associates, which had no bank account of its own, and the corporation itself paid all of the expenses listed on the partnership return as those of PHB (Pet. App. 8a–9a. The evidence further showed that throughout negotiations with the General Services Administration with respect to a lease of the real estate, the Virginia Corporation did not reveal that it was acting as an agent for PHB, rather than as a principal.[5] Finally, the evidence established that petitioners knew that

[4] Indeed, the corporation retained record title to the real estate as of two days before trial (Pet. App. 9a).

[5] In executing a "Proposal to Lease Space to the United States of America" (GSA Form 1364), petitioner Paul Pomponio twice listed the Virginia Corporation as the "Offeror" and also listed the corporation as the "Owner" of the real estate (Pet. App. 9a).

PHB Associates was not and could not have been validly formed in accordance with the partnership agreement. That agreement provided that all stock of the Virginia Corporation would be contributed to the capital of PHB; however, petitioners had previously pledged the corporation's stock as collateral for a debt unrelated to these proceedings, and that pledge arrangement existed until 1972 (Pet. App. 9a).

## ARGUMENT

1. Petitioners contend (Pet. 10–14) that the court of appeals erroneously measured the sufficiency of the evidence by references to criteria and standards that should be used exclusively in civil determinations of tax liability. In support of their contention, they point to the court of appeals' citation of *Livernois Trust* v. *Commissioner,* 433 F. 2d 879 (C.A. 6), and *Road Materials, Inc.* v. *Commissioner,* 407 F. 2d 1121 (C.A. 4) (see Pet. 11).

But the court of appeals correctly recognized (Pet. App. 4a) "that the criminal law concerns itself only with willful violations of the tax laws, not with inadvertent errors made in good faith." Its citations to *Livernois Trust* and *Road Materials, Inc.,* do not indicate, as petitioners suggest, that the court held that evidence that would be sufficient to establish a civil tax liability would also be sufficient to sustain a criminal conviction. To the contrary, the court cited those cases for the propositions that: (1) it is the shareholder's intention to repay that distinguishes a nontaxable loan from taxable income (Pet. App. 4a); and



(2) where there is no fixed date for repayment, no interest paid, no security, and no note executed, these factors indicate that the advance is a taxable dividend, rather than a loan (Pet. App. 5a–6a). Since the corporate payments to petitioners bore none of the indicia of loans, and the Virginia Corporation held itself out as the owner of the realty, the court of appeals properly concluded (Pet. App. 5a) that "the evidence was sufficient for the jury to have found beyond a reasonable doubt that the advances were not loans" and (Pet. App. 8a) that it was "sufficient for the jury to have found beyond reasonable doubt that the Virginia Corporation's loss was improperly allocated to the PHB partnership, and that the defendants were aware of that fact when they signed their 1971 tax returns." These conclusions do not merit review by this Court.[6]

2. Petitioners further argue (Pet. 14–17) that the trial court failed to give limiting instructions with respect to its severance of the conspiracy count. However, at the time it severed the conspiracy count, the trial court did explicitly instruct the jury that the conspiracy count had been severed and that they would hear no evidence relating to it. It stated as follows (Tr. 190; emphasis supplied):

[6] *United States* v. *Critzer,* 498 F. 2d 1160 (C.A. 4), upon which petitioners rely (Pet. 13 n.7), is irrelevant. In that case there was a legal question whether the defendant, an Indian living on a reservation, was subject to any tax on what was an undisputed set of facts. Here, if the moneys petitioners obtained from the corporations were not loans and the losses were not incurred by the partnership, there is no doubt that they filed false income tax returns.

The COURT. Members of the jury, I don't want you to get the idea that we forget you and let you sit in there. We did a lot of other things in the interim, by expediting the matters to be dis posed of during your absence.

The court heard from counsel and upon due consideration, the *court has severed some of the counts and I severed means that they are just cut apart and will be disposed of some other way by somebody, not you.*

So, *I have severed the conspiracy charge* leaving for your determination the four substantive counts, I believe there are four, is that right?

Mr. AHERN. Three, your Honor.

The CLERK. As to each.

The COURT. Three as to each. Three as to each of them for the three years, that would be nine now instead of four.

*In other words, you will hear the evidence on the alleged false statement,* the 1040 statement as to income taxes, and deductions, *not the conspiracy.*

All right.

*You won't need to be looking for any of that evidence because it won't be forthcoming and you will not be called upon to dispose of it, and it is not your province to go into why I did it.*

Neither of petitioners' counsel objected at this point to the trial court's instruction to disregard the conspiracy, nor did they request any other relief. If they believed that additional instructions were needed, this would have been the time to make such a request.



Moreover, at the conclusion of the trial, the trial judge again emphasized to the jurors that the facts were what the jury agreed upon, not what the government had suggested in its opening statement (Tr. 1091). Accordingly, the court of appeals correctly concluded (Pet. App. 19a) that the trial court gave adequate limiting instructions with respect to the severed conspiracy count.[7]

3. Finally, petitioners challenge (Pet. 17–20) the manner in which the trial court conducted the *voir dire* of the jury concerning the pretrial publicity surrounding this case. But their argument is premised on the assumption that the publicity was prejudicial—an assumption without support in the record. Despite their failure to call any example of prejudicial publicity to the attention of the trial court, petitioners nevertheless urge that the court should have examined each prospective juror individually with respect to the pretrial publicity.

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[7] Petitioners claim (Pet. 15–16) that the decision below conflicts with *United States* v. *Prieto*, 505 F. 2d 8, 12, n. 4 (C.A. 5); *United States* v. *Brown*, 540 F. 2d 364, 380 (C.A. 8); and *United State* v. *DeRosa*, 548 F. 2d 464, 471–473 (C.A. 3). Those cases do not support petitioners' claim in this case. In *Prieto*, the court held that the prosecutor's reference in his opening statement to the subsequently severed count was too brief to warrant a mistrial and that a limiting instruction would have emphasized the matter in the minds of the jury. In *Brown*, the trial judge admonished the jury to disregard the irrelevant rationale in the prosecutor's opening statement (see 540 F. 2d at 380). Likewise, in *DeRosa*, the trial court instructed the jury to disregard the portions of the prosecutor's opening statement containing assertions that were not borne out by the evidence.

In responding to this contention, the court of appeals stated (Pet. App. 12a–13a):

> The analysis we have consistently employed in cases of this nature requires the party seeking an individualized inquiry into the effect of publicity to bring specific examples of allegedly prejudicial publicity to the attention of the trial court. Only then can the court determine if the publicity is of a sufficiently prejudicial nature to mandate individual questioning of jurors or veniremen. *United States* v. *Jones,* 542 F. 2d 186 (4th Cir. 1976). General allegations of damaging publicity are sufficiently dealt with by questions and admonitions addressed to the panel as a whole. 542 F. 2d at 195, n. 11; see *United States* v. *Thomas,* 463 F. 2d 1061 (7th Cir. 1972); *Margoles* v. *United States,* 407 F. 2d 727 (7th Cir.), cert. den. 396 U.S. 833 (1969).
>
> We agree with the government that, because the defendants here failed to bring specific items of allegedly damaging publicity to the court's attention to enable it to determine independently whether individual questioning was either necessary or desirable, the court had no obligation to conduct such questioning. The defendants simply dumped the multitude of articles on the court, about 110 at one time and 28 [footnote omitted] at another, apparently hoping to make an impression on the basis of quantity alone, see *United States* v. *Jones, supra; United States* v. *Hankish, supra,* [502 F. 2d 71 (C.A. 4)] and inviting error when they asked the trial court to wade through the voluminous items of publicity without even the benefit of counsel's help in pinpointing objectionable matter.



Petitioners have never explained why they could not have brought any prejudicial news article to the attention of the trial court. Rather, they simply assert (Pet. 18) that the court of appeals has created "a standard which would be impossible to meet." But the standard applied by the court of appeals is no different from that of the other circuits. See, *e.g., United States* v. *Liddy,* 509 F. 2d 428, 434–437 (C.A.D.C.); *United States* v. *Hall,* 536 F. 2d 313, 324–326 (C.A. 10); *United States* v. *Polizzi,* 500 F. 2d 856, 880 (C.A. 9); *Margoles* v. *United States,* 407 F. 2d 727, 732 (C.A. 7), certiorari denied, 396 U.S. 833. See also *Beck* v. *Washington,* 369 U.S. 541, 556–557; *Murphy* v. *Florida,* 421 U.S. 794, 800–801, n. 4.

Petitioners also assert (Pet. 19–20) that there is a conflict among the circuits as to whether general admonitions to the jury with respect to pretrial publicity are sufficient. But the cases they cite (Pet. 20, n. 13) are not in conflict with the standard applied by the court of appeals. Those cases, like the decision below, all require some initial showing that the jury was likely to have been exposed to pretrial publicity that was prejudicial to the defendants. *United States* v. *Liddy, supra,* 509 F. 2d at 435; *Margoles* v. *United States, supra,* 407 F. 2d at 735; *United States* v. *Bryant,* 471 F. 2d 1040, 1044–1045 (C.A.D.C.), certiorari denied, 409 U.S. 1112; *Patriarca* v. *United*

*States*, 402 F. 2d 314, 318 (C.A. 1), certiorari denied, 393 U.S. 1022.[8]

At all events, the court of appeals correctly pointed out (Pet. App. 13a–14a) that petitioners had not challenged, individually or collectively, any of the jurors who had indicated that they had read something about the case. Indeed, at the bench conference prior to the conclusion of the *voir dire*, at which the trial court considered suggestions for further questions to be addressed to the panel, petitioners did not suggest any additional questions to be directed to those veniremen who had indicated exposure to pretrial publicity (R.A. 188–189). If petitioners deemed further questions essential, they should have requested the trial court to make specific additional inquiries. Since petitioners failed to suggest additional questions to challenge any of the jurors who had indicated an exposure to the pretrial publicity, or to bring to the trial court's attention any specific instances of prejudicial publicity, they cannot now be heard to complain that they were in fact prejudiced by the manner in which the *voir dire* was conducted.[9]

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[8] *Silverthorne* v. *United States*, 400 F. 2d 627 (C.A. 9), certiorari denied, 400 U.S. 1022, upon which petitioners rely (Pet. 18, 20), also does not support their claim. There, the court did not specify when individualized examination of jurors was necessary. Rather, the court held only that the individualized examination conducted in that case was inadequate.

[9] Petitioners contend (Pet. 17–18) that the court of appeals "ignored" the directive of *Sheppard* v. *Maxwell*, 384 U.S. 333. But the court of appeals took care to point out that the publicity in this case bore little resemblance to that in *Sheppard* (see Pet. App. 10a–11a, n. 9, 13a).



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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March 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978